SUPREME COURT, U. S.

Supreme Court, U.S.
FILED
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IN THE

Supreme Court of the United States

October Term, 1971

No. 71-327

TEXAS GULF SULPHUR COMPANY, a Texas Corporation, CHARLES F. FOGARTY, RICHARD D. MOLLISON, CLAUDE O. STEPHENS and HAROLD B. KLINE,

Petitioners,

v.

SECURITIES AND EXCHANGE COMMISSION,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

PETITIONERS' REPLY BRIEF

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Introductory Statement

The Commission has acknowledged the significance of the case from which this petition arises, but would avoid review by claiming that the issues were correctly decided by the Court of Appeals. The Court will recognize that the Brief in Opposition (hereafter "SEC Br.") is, in reality, a brief on the merits of the Commission's case against petitioners. But only a full briefing and argument can properly apprise the Court of the proceedings below,

and of a record which these petitioners contend supports the initial decision rendered by an experienced and conscientious trial judge after four weeks of trial and after full consideration of the testimony of numerous factual and expert witnesses and hundreds of exhibits. We urge this Court to grant such full review, not only in justice to petitioners, but also to settle important questions of federal law which have never been decided by this Court and which are principally contained in the majority and minority opinions filed in 1968 in the Second Circuit Court of Appeals after *en banc* consideration (66a-171a).

I

The Issues Involved Are Properly Before This Court.

The contention of respondent that this Court is without jurisdiction emphasizes its extreme reluctance to have this case considered on the merits. In the court below it sought to strike the appeal from Judge Bonsal's judgment, and the same contentions are now made in an attempt to thwart review.

Respondent first argues that petitioners' notice of appeal from the judgment of the District Court was filed prematurely. The contention is without merit.* But even

* *Marotta* v. *Milestone*, 314 F.2d 242 (D.C. Cir. 1963); *Frankfort Oil Co.* v. *Snakard*, 279 F.2d 436, 438 (10th Cir.), *cert. denied*, 364 U.S. 920 (1960). Indeed, respondent itself signed a stipulation recognizing the validity of the notice of appeal and thus is estopped from challenging it at this time. *Associated Press* v. *Taft-Ingalls Corp.*, 323 F.2d 114, 116 (6th Cir. 1963). Such stipulation of course gave ample notice to respondent of the appeal. See, *e.g.*, *Curtis Gallery & Library, Inc.* v. *United States*, 388 F.2d 358, 360 (9th Cir. 1967).

if this claim were to be credited, it goes to the question of the Second Circuit's jurisdiction, not to the jurisdiction of this Court. The petition for certiorari was timely filed in this Court. The claim of alleged prematurity was fully briefed and argued before the court below. That court, however, considered the case on the merits, thereby rejecting respondent's contention.*

Respondent also claims that petitioners Texas Gulf, Fogarty, Mollison and Stephens cannot maintain this appeal because no relief was ordered against them in the judgment entered below. Again, this argument was fully briefed and argued before the Court of Appeals which rejected it and rendered its decision on the merits.** More-

* Such rejection was in full accord with this Court's consistent and clear admonitions that technicalities should not be used to oust the jurisdiction of an appellate court. See *Foman* v. *Davis*, 371 U.S. 178 (1962). *Cf. General Time Corp.* v. *Padua Alarm Systems, Inc.*, 199 F.2d 351 (2d Cir. 1952) (concurring opinion), *cert. denied*, 345 U.S. 917 (1953). The hypertechnicality of respondent's argument is further underlined in that the complaint is not of a late-filed notice of appeal but of an allegedly premature one. This Court and numerous circuit courts have repeatedly refused to countenance such arguments. *Luckenbach S.S. Co.* v. *United States*, 272 U.S. 533 (1926); *Lemke* v. *United States*, 346 U.S. 325 (1953); *accord*: *U.S.* v. *Kokin*, 365 F.2d 595 (3rd Cir.), *cert. denied*, 385 U.S. 987 (1966).

** The reasons for the result are plain, for these petitioners are clearly parties aggrieved by the proceedings below. They have been the subject of four well-publicized opinions of federal courts which have finally resulted in findings that they violated Section 10(b) and Rule 10b-5. The judgment below does not dismiss the complaint, as prayed for by petitioners; rather it recites findings of violation and retains jurisdiction in the District Court. In addition, the opinion below, and the record on the docket of the Clerk of the District Court, provides that "if any of the defendants not here enjoined should again violate Section 10(b) and Rule 10b-5 the remedy of injunction in addition to other remedies would be appropriate." (213a-214a). The case is not unlike *Sullivan* v. *Committee on Admissions & Grievances*, 395 F.2d 954 (D.C. Cir. 1968), where a warning rather

over, this Court has even greater reason to entertain this case as the petition for certiorari opens for review the first decision of the Court of Appeals. See *Hamilton-Brown Shoe Co.* v. *Wolf Bros. & Co.*, 240 U.S. 251 (1916). The first decision of the Second Circuit reversed a judgment dismissing the complaint against these four petitioners; they were certainly "parties aggrieved" by that decision.

As to petitioner Kline, respondent contends that the decision below is not final. Lack of finality would not, of course, deprive this Court of its power to review. The only issue as to Mr. Kline that was not resolved by the judgments appealed from concerns the basis upon which the District Court imposed the penalty against Mr. Kline.* The substantive question of whether Kline violated Section 10(b) was finally determined by the Second Circuit in the decisions here sought to be reviewed. Moreover, the ques-

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than other discipline was issued to a lawyer after a finding of violation of the Canons of Ethics. The Court of Appeals upheld defendant's right to appeal:

> "However, the District Court has determined that Appellant was guilty of proscribed conduct and this determination plainly reflects adversely on his professional reputation. In a sense Appellant's posture is not unlike that of an accused who is found guilty but with penalties suspended. We conclude this gives him standing to appeal." 395 F.2d at 956.

* A timely notice of appeal on behalf of Kline from the judgment of the District Court, entered October 4, 1971, was filed on November 19, 1971. The second decision of the Court of Appeals reversed the judgment rescinding the stock options awarded Mr. Kline as he had not had a hearing on that issue, and remanded to the District Court for it to exercise its discretion in determining the appropriate remedy to be entered. But the District Court decided that the "law of the case" required entry of the order issued. The issue which remains for the Court of Appeals is an extremely limited one.

tion of the power of the federal courts to award monetary relief to the Commission in an injunction proceeding (especially where no injunction is granted) was also finally determined by the Court of Appeals and is also raised in the petitions of Messrs. Holyk, Darke, Clayton and Huntington. (Docket Nos. 71-328 and 71-347). In any event, if this Court grants certiorari, the appeal before the Second Circuit will be expedited and all issues can be fully presented to this Court.

II

This Court's Supervisory Power Should Be Exercised in This Proceeding.

In this case, upon the urging of the Commission, the Court of Appeals has so far departed from the accepted and usual course of appellate proceedings as to call for an exercise of this Court's power of supervision. The respondent's brief in opposition studiously ignores Point VI (pp. 36-38) of the petition, which discusses the proper scope of appellate review.

That this is an important issue can be seen from the dissent of Judge Moore and Chief Judge Lumbard:

> "In their opinion, the majority have become so involved in usurping the function of the trial court, in selecting the witnesses they (at variance with the trial court) choose to believe, in forming their own factual conclusions from the evidence (in disregard of Rule 52a), in deciding with, of course, the benefit of the wisdom of hindsight, how they, had they been executives of Texas Gulf Sulphur Company (TGS), would have handled the publicity attendant to the exploration of the Timmins property, in determining (to their own

> satisfaction) the motives which prompted each of the individual defendants to buy TGS stock and in becoming mining engineering experts in their own right, that I find it desirable—in fact, essential—to state my opinion as to the fundamental jurisdiction of the Court of Appeals and the issues properly before us." (129a-130a)

That the majority of the Court of Appeals usurped the function of the District Court becomes apparent in respondent's recitation of "the evidence relevant to petitioners." (SEC Br., p. 7). Except for reference to certain stipulated or undisputed facts, for which respondent cites the District Court opinion, the Commission's reference to an opinion for factual matters is almost entirely to the decision of the Court of Appeals, which of course neither saw nor heard the witnesses, including the eleven experts. (See SEC Br., pp. 7-14). Circuit Judge Moore pointed out in dissent that "factually, the premise posed by the majority [as to the significance of the first drill hole] is 'clearly erroneous'" (136a), and that "the trial court's finding as to this fact is unassailable" (139a). Judge Moore also pointed out that the District Court's factual conclusions were "amply supported by the record" (140a), and that its finding that the drilling results prior to April 9, 1964 would not have had a substantial impact on the market price of TGS stock were "clearly supported by the proof upon which the court relied" (143a).*

* With respect to petitioner Kline, the Court of Appeals in its first opinion reversed the District Court's finding that Kline did not possess any information which could be deemed material. In its second opinion the Court of Appeals stated that the question of Kline's knowledge was "an extremely close one factually" (231a). Is it within the fundamental jurisdiction of the Court of Appeals to decide an "extremely close" factual question and reach a decision contrary to that reached by the trial court?

How the Second Circuit fell into error can be partially understood by further reference to respondent's brief herein. On the basis of the extensive expert testimony and other evidence produced at a four-week trial, Judge Bonsal had found that the results of the first drill core "were too 'remote' when considered in light of the size of TGS, the scope of its activities and the number of its outstanding shares [10,000,000], to have had any significant impact on the market, *i.e.*, to be deemed material" (30a). But the Commission cited to the Court of Appeals (see 141a), as it has cited to this Court, not the expert testimony credited by Judge Bonsal, but a description of the initial drill hole subsequently written by a newspaper reporter (SEC Br., p. 8). This was not the District Court's finding. The description that the drill hole was "just beyond your wildest imagination" was found by the Commission buried in a deposition of a Canadian penny stock speculator. That testimony of lay opinion was not credited by the trial court, but at the respondent's urging was adopted by the Court of Appeals.

Another example may be found at page 11 of the SEC brief, purporting to quote from Judge Bonsal's opinion following trial. It suggests that the District Court found the April 12 release to be "gloomy". That the word "gloomy" is taken out of context and was not a finding made by the District Court was pointed out by Judge Moore in dissent below:

> "Nor did he [the District Court] find the release to be 'gloomy.' His statement was that: 'While, in retrospect, the press release may appear gloomy or incomplete, this does not make it misleading or deceptive on the basis of the facts then known.' " (153a)

The SEC brief telescopes dates, events and parties together, resulting in a distortion of the facts as they developed from day to day. The resulting obfuscation of the proceedings below illustrates the danger of considering the merits from papers on an application for certiorari.

III

The Press Release Issues

Respondent quotes as a holding by the Court of Appeals below that the Securities and Exchange Commission was "charged by Congress with the responsibility of policing all misleading corporate statements" (SEC Br., p. 19). Indeed that court did use that language, but the balance of the sentence quoted from the majority opinion refers to specific statutory regulations running from the initial prospectus on a stock issue to proxy statements for corporate merger or dissolution (111a). No statutory authority was cited or can be found for "policing" good faith responses to false rumors in the public press, and no administrative rule has ever attempted to assert such authority.

In advocating the correctness of the result reached below, respondent is compelled to accept the basic premise of the petition—that Section 10(b) and Rule 10b-5 have been construed by the courts so as to in effect swallow up the particular provisions of the 1933 and 1934 Acts (SEC Br., p. 29). Respondent, however, sees this nullification of the Congressional scheme by means of judicial construction of its administrative rule as a favorable development, and makes light of the consequences.

Respondent's assertion that "Section 10(b) was intended to be as broad as the Act itself" (SEC Br., p. 29) of course begs the question. The authorities cited to support this contention in fact contradict it. Thus, *Herpich* v. *Wallace,* 430 F.2d 792 (5th Cir. 1970), holds that Section 10(b) was designed as a protection against fraud* (*id.* at 801-02), and that it reaches only "manipulative or deceptive devices or contrivances" (*id.* at 806). The Act itself reaches much farther, as respondent admits elsewhere (SEC Br., p. 40, n. 48 (con.)), to outlaw, for example, short-swing transactions by "insiders" in the absence of fraud.

Despite the sweeping assertions contained in respondent's brief (p. 30), there is no authority, other than that of the court below, to support the conclusion that the "in connection with" requirement of Section 10(b) and Rule 10b-5 can be satisfied by issuance of a press release unless its purpose is to affect the market price of the company's stock to the advantage of the company or its insiders (157a).** The recent authorities cited by respondent—

* We do not suggest that *all* of the elements of an ordinary damage suit for fraud need be proved in an enforcement proceeding, but that "all" need not be proved does not mean that "none" of the elements need be proved, as respondent implies (SEC Br., pp. 27-28). Yet the authorities cited by respondent contain phrases referring to elements of fraud which the respondent asserts it need not prove, and respondent then applies the phrases and cites cases of conceded fraud as though this record contained proof of these elements, *e.g.*, " 'securities legislation' enacted for the purpose of avoiding frauds" (SEC Br., p. 28); " 'illegitimate and fraudulent means' " (SEC Br., p. 29).

** At page 30 of its brief, respondent states that the April 12 press release "was issued to counteract the market effect of newspaper reports." Yet the Commission cites no finding by either the District Court or the Court of Appeals that this was the purpose of the release. The purpose was to warn the public of false and exaggerated rumors and to promise a factual statement as soon as responsible conclusions could be drawn from the drilling program.

Superintendent of Insurance of New York v. *Bankers Life and Casualty*, Docket No. 70-60, November 1, 1971; *Herpich* v. *Wallace*, 430 F.2d 792 (5th Cir. 1970); *Kahan* v. *Rosenstiel*, 424 F.2d 161 (3rd Cir. 1970), *cert. denied sub nom., Glen Alden Corp.* v. *Kahan*, 398 U.S. 950 (1970)—all deal with the question of whether plaintiff was a purchaser or seller of securities defrauded in a transaction, thus having standing to sue. In this case the question is whether the "in connection with" requirement is satisfied when the *defendant* was not involved in purchases or sales of stock, nor seeking a market advantage. In their dissent below, Judges Moore and Lumbard reviewed at length the authorities with respect to this issue (155a-169a, esp. 166a-169a), and in particular discussed several cases now cited by respondent (SEC Br., p. 30, n. 29). We respectfully refer this Court to that analysis, which concludes that the majority's holding "is contrary to the intent of Congress in passing §10(b) and settled judicial construction" (157a).

As for the Commission's proposition that the legislative history supports its contention that it is the policeman of all public statements, we again refer the Court to the dissenting opinion of Judges Moore and Lumbard below (158a-169a). In particular they pointed out that the bits of legislative history relied upon by the majority to support its broad (indeed limitless) reading of Section 10(b), were in fact statements regarding the reporting and disclosure provisions of Sections 12, 13, 14 and 16 and were not directed to the provisions of Section 10(b) (162a-63a). As demonstrated in the petition herein (pp. 23-24) and supported by consistent judicial interpretation, including the

cases cited by respondent (SEC Br., p. 29, n. 34), Section 10(b) was designed to deal with problems not involved in the case at bar—that is, new devices and contrivances developed from time to time by stock manipulators. There is nothing in the legislative history to suggest that Section 10(b) was "intended to be a mandate to the Commission to erect a comprehensive regulatory system policing all corporate publicity" (158a) (compare SEC Br., p. 31) "without any of the detailed standards necessary to implement such a program" (165a).

Certainly there is no support for the respondent's contention that Congress intended by §10(b) to eliminate rights under the First Amendment. While the Commission recognizes that First Amendment rights for newspapers or pamphleteers "may be necessary," it has no tolerance for such rights for corporate officials (SEC Br., p. 45). It justifies this position on the ground that the First Amendment does not deter use of governmental power to prohibit false statements for fraudulent purposes. But here no fraud was involved, nor was speech used for any commercial motivation.

Respondent relies on numerous cases involving commercial advertising (*e.g., Donaldson* v. *Read Magazine, Inc.*, 333 U.S. 178 (1948); *Banzhaf* v. *FCC*, 405 F.2d 1082 (D.C. Cir. 1968), *cert. denied sub nom., Tobacco Institute* v. *FCC*, 396 U.S. 842 (1969), or attempts to raise money through speech (*e.g., United States* v. *Amick*, 439 F.2d 351 (7th Cir. 1971), *cert. denied*, No. 70-134 (Oct. 12, 1971); *SEC* v. *May*, 229 F.2d 123 (2d Cir. 1956)). For example, in the *Donaldson* case, *supra*, the issue came down

to whether defendants had the right "to raise money * * * by deception of the public" (333 U.S. at 192), and the Court held that the First Amendment did not include such a right. In contrast, it is not here charged that Texas Gulf, in issuing the April 12 press release, was advertising its securities or seeking to raise money. Texas Gulf's economic interests were not benefited in the slightest degree by the release, nor was such a result intended by those who issued it.

Again, it should be clear at this stage of the litigation that petitioner is not contending that it has a right to "unfettered corporate or commercial speech" (SEC Br., p. 46). What it does contend is that when, as here, a company has exercised "reasonable business judgment" while pursuing a "laudable" purpose in the public interest, without economic motivation, in commenting on matters of front-page moment, its efforts should be protected under the principles of the First Amendment.

Viewing this controversy as a whole, it is transparently clear that both the Commission and the Court of Appeals have judged the press release with the aid of hindsight. See the dissent of Judges Moore and Lumbard (130a, 150a). In so doing they have imposed different and stricter standards on voluntary corporate publicity than are imposed even on prospectuses and registration statements. But neither the 20/20 vision of hindsight nor the ability to divine what the Court of Appeals might announce as the applicable legal rules four years later were available to the Texas Gulf officials who were required to act promptly on the weekend of April 11-12, 1964. On the inconclusive evidence before them, they issued a wait and see statement warning

of the extravagant rumors and promising a later statement. There was no reason or motive for them to do otherwise. Hindsight evaluation of the press release cannot be justified on legal or policy grounds. As stated by the late A. A. Berle, Jr., in THE 20TH CENTURY CAPITALIST REVOLUTION 63-64 (1954):

> "If every decision by management were reviewable on all of its merits, the reviewing authority—court, investigation commission, regulatory authority, or whatnot—would be, in the old phrase 'substituting its business judgment for the business judgment of management.' In effect it would be running the business. If anything is settled it is that the exercise of power within the range of its permissible use is lonely business. Within that range the true judge is the conscience of the man or men who act."

IV

The Conflicting and Erroneous Materiality Tests Applied Below

In determining what facts constitute "material" information, "the Texas Gulf Sulphur decision of the Second Circuit has contributed confusion rather than clarity." Bromberg, *Financial Analysts Journal* 30 (March-April, 1969). The confusion continues. See 4 *Review of Securities Regulation* 846 (Nov. 8, 1971) which notes "the uncertainties still inherent in the materiality test * * *." Respondent's brief herein compounds the problem.

In a footnote on page 36 of respondent's brief appears one of the most remarkable statements to come out of this case—a statement by the Securities and Exchange Commis-

sion that the definition of "materiality" which it has promulgated under *all* the securities laws it administers* does not apply to Section 10(b) and Rule 10b-5! (SEC Br., p. 36, n. 40). Yet since 1934 the Commission's definition of a material fact has been as provided in Rule 12b-2(j) under the 1934 Act:

> "The term 'material' when used to qualify a requirement for the furnishing of information as to any subject, limits the information required to those matters as to which an average prudent investor ought reasonably to be informed before buying or selling the security registered." Rule 12b-2(j) (17 C.F.R. §240.12b-2(j)).

There is nothing in this provision which limits its applicability to other sections of the Act; it is therefore in no way analogous to the situation in *SEC* v. *National Securities, Inc.*, 393 U.S. 453 (1969) (SEC Br., p. 36, n. 40), where the rule involved was specifically stated to be applicable to only one section of the securities laws.

If the standard of materiality under Rule 10b-5 is indeed lower than that of the remainder of the securities laws, remarkable results follow: thus, a registration statement, drafted in full compliance with the 1933 Act and the standards of materiality thereunder, could be the subject of a suit under Rule 10b-5 for failure to disclose a fact which may

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* See, *e.g.*, Rule 12b-2(j) (17 C.F.R. §240.12b-2(j)) under the Securities Exchange Act of 1934; Rule 210.1002(g) (17 C.F.R. §210.1-02(g)) of Regulation S-X which governs all financial statements filed under the securities laws; Rule 405 (17 C.F.R. §230.405 (1)) of Regulation C under the 1933 Securities Act; and Rule 8b-2 (17 C.F.R. §270.8b-2) under the Investment Company Act of 1940 (15 U.S.C. §80a-1).

be material under whatever unpublished definition the Commission may choose for that occasion. In such a situation, the specific disclosure requirements of the 1933 Act would serve only to entrap those who comply with their terms.

While it is true, as respondent asserts, that the Court of Appeals *stated* two common tests of materiality previously enunciated by the courts, it also stated several other tests. These tests range from a description of material facts as those which are "essentially extraordinary", and reasonably certain to have a "substantial effect" on the market, to "those facts which *may* affect the desire of investors [defined to include 'the speculators and chartists of Wall and Bay Streets'] to buy, sell or hold." (Emphasis supplied). It is this last test which was apparently *applied* by the Court of Appeals—no other test could possibly support the Second Circuit's decision on the facts as found by the trial court. As one commentator has stated regarding the Second Circuit's conflicting tests: "the two sets of ideas are inconsistent, and we will be plagued by doubts as a result. The net effect of the court's opinion is * * * to set a very low threshold of materiality", one which he finds "dangerously low from the viewpoint of persons who honestly want to know if they have information which imposes legal restrictions on them." Bromberg, *Financial Analysts Journal* 30 (March-April, 1969).

It is not true, as respondent asserts, that the District Court considered materiality from the point of view of the long-term, conservative investor, or that the effect of its decision would be to leave the speculator unprotected. What the District Court said, in accordance with the

"average, prudent investor" test, was that "information is not material merely because it would be of interest to the speculator on Bay Street or Wall Street" (25a). Judge Bonsal held that "The results of K-55-1 were too 'remote' when considered in light of the size of TGS, the scope of its activities, and the number of its outstanding shares, to have had any significant impact on the market, *i.e.*, to be deemed material" (30a). Both long-term, conservative investors and speculators are entitled to the same protection under the Act; but it does not follow that therefore different standards of materiality are applicable to various categories of investors and traders.*

V

Petitioners Did Not Have the Required Fair Warning.

If, as the Commission contends, Congress enacted the Securities Exchange Act for the express purpose of prohibiting the conduct of petitioners herein, it is certainly odd that more than thirty years passed since that enactment and more than twenty years passed since it adopted Rule 10b-5, before the Commission took the position which it has pursued in this suit. During all that period, the Commission did not promulgate a regulation specifically prohibiting the conduct here complained of. The commence-

* The authorities cited by respondent at page 35 simply miss the mark. The information to be disclosed under the securities laws is that concerning which the average, prudent investor ought to be informed; once disclosed, it can of course form the basis for a speculative judgment. What must be avoided, however, is framing rules of disclosure which require corporations and their managements to guess, at their peril, what "may" conceivably be "of interest" to a speculator. The special registration forms for "securities of a speculative nature" referred to by respondent do not contain any lesser standard of materiality than that generally applicable under the securities laws.

ment of this suit generated extreme consternation and surprise, which has not yet quieted. (See Addendum to the Petition for Certiorari, listing law review and business articles which continue to discuss this case in heated terms.)

The Commission cites *Jordan* v. *DeGeorge*, 341 U.S. 223, 231-32 (1951), for the proposition that ample notice was supplied. The case does point out that "difficulty in determining whether certain *marginal* cases are within the meaning of the language under attack as vague does not automatically render a statute unconstitutional for indefiniteness." *Id.* at 231. (Emphasis added). We do not understand the respondent to be asserting that petitioners' conduct was marginal. We heartily concur with the test there enunciated by this Court:

> "The test is whether the language conveys sufficiently definite warning as to the prescribed conduct when measured by common understanding and practices." *Id.* at 231-32.

As Judge Moore pointed out in suggesting that resolution of the many problems presented here should be through rule-making procedures:

> "The companies, the securities of which are listed on exchanges, their employees and investing public alike should have some knowledge of the rules which will govern their actions. They should not be forced, despite an exercise of the best judgment, to act at their peril or refrain *in terrorem* from acting." (145a)

Respondent at pages 36 and 37 of its brief and footnotes 42 through 45 contends again that its administrative decisions, press releases, briefs *amicus curiae* and other

publications amply warned petitioners that their conduct was covered by Rule 10b-5. However, the Administrative Procedure Act contains specific provisions for promulgation and dissemination of substantive rules as authorized by law and statements of general policy or interpretations, and as amended in 1966 (80 Stat. 250), Section 1002(a) adds that no person may be "adversely affected by" informally published matter such as cited by the respondent.

The Administrative Procedure Act, amended in 1966, requires that all administrative opinions issued after July 4, 1966 be indexed "providing identifying information for the public," and that:

> "No final order, opinion, statement of policy, interpretation, or staff manual or instruction that affects any member of the public may be relied upon, used or cited as precedent by an agency against any private party unless it has been indexed and either made available or published as provided by this subsection or unless that private party shall have actual and timely notice of the terms thereof." 5 U.S.C. §1002(b), 80 Stat. 250.

The authorities cited by respondent to show that fair warning was given did not comply with these requirements of law. Of the four Commission opinions cited by respondent in footnote 42, one was not even indexed and the other three are indexed under Section 15 of the Exchange Act, not §10(b) or Rule 10b-5. That those decisions may have come to the attention of broker-dealers whose conduct is regulated by §15, and who continually are apprised of SEC activity, can not justify the contention that these petitioners, unconnected with the securities industry, had their "attention called" to the respondent's

position taken in this case. It is significant that all of the authorities cited by the respondent to support its statement that "the results reached by the court of appeals follow logically from the development of the federal securities laws in this area" actually follow the filing of the complaint in this action wherein the new law was sought to be made (SEC Br., p. 25, n. 19). The impact which the Commission's complaint and the decisions of the Courts below have had as reported in the press is eloquent testimony that fair warning had not been received by the public at large, including even the sophisticated investment community.

Conclusion

We again urge that the petitions filed in this case be considered along with the petition filed in the Tenth Circuit litigation against Texas Gulf Sulphur by Mitchell and Reynolds (No. 71-421). These two cases raise issues of great importance to the business and investment communities and to the public generally which have never been decided by this Court.

The petition should be granted.

Respectfully submitted,

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November 24, 1971